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IN THE MATTER OF THE REQUEST FOR AGENCY ACTION OF BERRY PETROLEUM COMPANY LLC, A WHOLLY OWNED SUBSIDIARY OF LINN ENERGY, LLC, AS SUCCESSOR IN INTEREST TO BERRY PETROLEUM COMPANY, FOR AN ORDER FORCE-POOLING THE INTERESTS OF ALL OWNERS REFUSING OR FAILING TO BEAR THEIR PROPORTIONATE SHARE OF THE COSTS OF DRILLING AND DRILLING AND OPERATING THE DRILLING AND SPACING UNITES LOCATED IN SECTIONS 5 AND 7 IN TOWNSHIP 6 SOUTH, RANGE 4 WEST, USM, DUCHESNE COUNTY, UTAH.	**Division of Oil, Gas and Mining's Memorandum in Opposition to the Request for Agency Action** **and** **in Support of Motion to Continue Hearing** Docket No. 2014-012 Cause No. 272-04

The Division of Oil, Gas and Mining ("**Division**"), respectfully submits this Memorandum in Opposition to the Request for Agency Action because Berry Petroleum Company, LLC ("**Berry**") seeks a force-pooling order that relates back to a time before the entry of a spacing order in violation of established precedent, and that the pre-filed exhibits fail to provide the minimal evidence required for its approval.

The Division simultaneously with the filing of these Objections has filed its Motion to Continue Hearing of the Request for Agency Action to provide an opportunity for the Petitioner

to address the Division's Objections and provide further evidence in support. This Memorandum is also filed in support of that Motion.

BACKGROUND

Berry has requested the Board create forty-acre drilling and spacing units for production of the Green River and Wasatch Formations within two sections in Duchesne County. Request for Agency Action, Berry Petrol. Co. ("**Berry I**"), Docket No. 2014-004, Cause No. 272-03 (Bd. of Oil, Gas & Mining Dec. 10, 2013). Berry Petroleum Company owns a majority of the working interest in a federal lease which includes those two sections. Id. at 2.

In the present matter, Berry has requested the Board to force-pool the interests of Burton/Hawks, Inc. ("**Burton/Hawks**") that is a working-interest owner Berry has been unable to contact. Request for Agency Action at 3–4, **Berry II**, Docket No. 2014-012, Cause No. 272-04; id. (exhibit I). Burton/Hawks is a corporation who was once registered to do business in Utah, but has been "expired" since 1989. Business Search, Utah Div. of Corps. & Com. Code, https://secure.utah.gov/bes/action/details?entity=663321-0143 (last visited Feb. 11, 2014). Burton/Hawks has a registered agent to accept notice. Id.

Burton/Hawks owns a working interest in the two sections. Request for Agency Action at 3, Berry II, Docket No. 2014-012, Cause No. 272-04. It owns 21.875% of the working interest of the minerals below the Lower Green River Formation that lie within Section 7 and approximately three-quarters of Section 5. Id. (exhibits A, K.) It also owns 10.9375% of the working interest for the minerals at the same depth that lie within of the southwest quarter of section 5. Id. Berry has provided no evidence that Burton/Hawks has been dissolved or wound-up. Berry has advised counsel that it believes Burton/Hawks, or possibly an identified successor in interest, may be subject to a bankruptcy proceeding in the U.S. Bankruptcy Court in the District of Colorado around 2006 but that its ownership of the working interest in these lands

was ignored by the trustee. However, Berry has provided no evidence to support these claims of assignment or bankruptcy, and has further and more importantly failed to provide evidence of its efforts to locate any successor entities, or persons, and evidence of efforts to provide notice to any representative or principals of Burton/Hawks, or any successor, bankruptcy trustee, or any other possible successors in the initial or supplemental exhibits.

DISCUSSION

When a Petitioner requests the Board take action, they must set forth the facts and reasons forming the basis for the relief. Utah Admin. Code R. R641-104-100(133.500) (2013). In addition, the Petitioner has the burden to persuade the Board that action is legal and good policy. It is unclear, at this point, if Berry will satisfy both burdens. This Memorandum will address both issues in turn.

I. Berry has provided no legal argument or justification to ignore the Utah Supreme Court's Cowling holding that pooling orders must not predate spacing orders absent inequitable conduct.

The Utah Supreme Court in Cowling v. Board of Oil, Gas and Mining, held a spacing order is a "prerequisite" to pooling, 830 P.2d 220, 228 (Utah 1991), and that for a well lying where "no preexisting . . . spacing order has been entered, the rule is that a pooling order should be effective no earlier than the date of the spacing order . . . ." Id. at 229. There might be reasons why the Board's order could distinguish Berry's matter from the Cowling decision, but Berry has failed to explain how or why it should. Some of the wells were drilled and have been producing since 2010 and could have significant economic consequences on affected parties. The court, in Cowling, also held that under certain "inequitable or overreaching conduct," a pooling order may predate a spacing order. Id. at 227, 229. Petitioner has made no allegations of inequitable conduct. Furthermore it is difficult to imagine how a petitioner's oversight or intentional delay could constitute such a basis for retroactive pooling. When the parties are

known, it is assumed to be an obligation to try and locate the parties and provide timely notice before seeking a penalty. See Utah Code § 40-6-2(11) (West 2013). If a delayed notice could provide a basis for retroactive pooling, property rights associated with the "law of capture" would have no certainty and such rights would be unprotected. That result is contrary to the mandate of the Utah Oil and Gas Conservation Law and the cases interpreting that statute. See, e.g., Adkins v. Bd. of Oil, Gas & Mining, 926 P.2d 880 (Utah 1996). Given the substantial and clear contrary law, it is not sufficient for the Petitioner to avoid its obligation to set forth the law that supports his requested relief and simply rely on presentation at the hearing. The Division and the Board are entitled to a brief or other statement in advance of the hearing of the legal and factual basis for seeking this extraordinary relief.

II. Berry has failed to supply proof of the written opportunity to participate to Burton/Hawks for each well it seeks to pool.

Under Hegarty v. Board of Oil, Gas and Mining, the operator must notify another party of the opportunity to participate in a well before the force-pooling statute can be requested. 2002 UT 82, ¶ 32–33, 57 P.3d 1042. As the Utah Supreme Court said,

> [P]er-well participation is the substantial focus of the Utah Act, and of the notice requirement. In such a context, notice cannot be inferred. Only actual, detailed, specific, written notice of a ***well*** can satisfy the Utah Act.
>
> Thus the written notice requirement moderates the stringency of the nonconsent penalty by assuring that no uninformed owner becomes nonconsenting by default.

Id. (emphasis in original). Therefore, Berry must provide proof that it gave Burton/Hawks notice on each of the thirty-two wells in which it is asking the Board to force-pool. So far, only one exhibit provides any proof of an attempt to notify; however, that attempt was sent over three years after the drilling of some of the wells and as a collective demand for twenty-four wells. Even if this attempt was found to satisfy the Hegarty requirements, it fails to address eight of the

thirty-two wells, which are subject to the Request. Supplemental Exhibits, Berry II Docket No. 2014-004, Cause No. 272-03 (exhibit J). Without that proof, the Board cannot force-pool the other wells.

III. A continuance of the hearing of this matter is prudent and justified.

The Division is required to be a party to any petition and is to review evidence submitted. Utah Code § 40-6-16(4); Utah Admin.Code R. R641-101-100. A continuance is necessary for it to intelligently advise the Board. In this matter, and at this time, the Division feels unprepared to give any recommendation because of the particular procedural history of this matter.

Originally, the Division was preparing to object on due process grounds because Berry's attempts to find Burton/Hawks never included notifying Burton/Hawk's registered agent. However, Berry told the Division that it intended to continue both Berry I and Berry II (that is, both the spacing and pooling matters) indefinitely or withdraw them altogether. On April 9, 2014, the date for filing objections, the Division was advised that Berry now intended to move forward with the request for the April hearing with newly submitted exhibits which would likely resolve the Division's earlier concerns.

On April 15, 2014, Berry submitted its proposed supplemental exhibits, however these exhibits did not provide the additional information that was expected. The Division is still concerned. The Petitioner has not met its obligation to provide exhibits that will support a *prima facia* case because there is no evidence of a written offer to participate in all of the wells for which forced pooling is requested. In addition, it is still unclear whether the Board can distinguish this matter from the Cowling case and whether Berry has satisfied their due process obligations in trying to notify the owners of the Burton/Hawks interest.

The Division recognizes that the Board's April hearing is soon approaching, and that late discussions make it difficult for the Board to give careful thought to the matter. After consideration of the potential importance of the decision in this matter, the Division believes the correct and prudent course of action would be to continue the matter until the May Board Hearing so Berry can submit additional evidence and a memorandum in support of its request allowing the Division to respond. The Board should invoke its powers under Utah Administrative Code Rule R641-105-500 and continue this matter.

CONCLUSION

The Division might in the future support Berry's requests; however, at the present time it cannot do so because the binding law seems to preclude their request and because Berry has failed to supply enough evidence in their exhibits to justify the Board granting their request. The Division asks the Board to continue the hearing in this matter so Berry can address the Division's objections and allow the Board and the Division time to consider Berry's response in advance of a hearing.

RESPECTFULLY SUBMITTED this 17th day of April, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **MOTION TO CONTINUE AND MEMORANDUM IN OPPOSITION TO THE REQUEST FOR AGENCY ACTION AND IN SUPPORT OF MOTION TO CONTINUE HEARING** for Docket No. 2014-012, Cause No. 272-04 to be mailed via E-Mail, and First Class Mail, with postage prepaid, this 17th day of April, 2014, to the following:

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